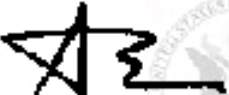


ORDERED.

Dated: May 22, 2015



Arthur B. Briskman
United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION
www.flmb.uscourts.gov

In re:

KELLY LEVINSON,

Case No. 6:13-bk-05214-ABB
Chapter 13

Debtor.

**ORDER GRANTING THE DEBTOR'S MOTION TO SELL (OTHER)
PROPERTY (DOC. NO. 112); OVERRULING THE OBJECTION TO THE MOTION
TO SELL (OTHER) PROPERTY (DOC. NO. 119); AND DENYING THE MOTION FOR
RECONSIDERATION OF THE ORDER GRANTING DEBTOR'S SECOND VERIFIED
MOTION TO VALUE CLAIM 9 (DOC. NO. 120)**

This matter came on for hearing on May 13, 2015 (the "Hearing") on the Motion to Sell (Other) Property (Doc. No. 112, the "Motion to Sell") filed by the Debtor on April 9, 2015 and the Objection to the Motion to Sell (Doc. No. 119, the "Objection") filed by the Creditor, Nationstar Mortgage, LLC; along with the Motion for Reconsideration of the Order Granting Debtor's Second Verified Motion to Value Claim 9 (Doc. No. 120, the "Motion for Reconsideration"). The Motion to Sell is due to be granted, the Objection is due to be overruled, and the Motion for Reconsideration is due to be denied.

Background

The Debtor filed the instant case on April 27, 2013 (Doc. No. 1) (the “Petition Date”) listing three properties in her schedules including real property located at 3217 Timothy Street, Apopka, FL 32703 (the “Property”). The Creditor filed a claim in the amount of \$218,685.83 secured by a first mortgage in the Property with arrearages in the amount of \$35,938.63 (Claim No. 9). The Debtor filed her Verified Motion to Value the Creditor’s Claim (Doc. No. 84, the “Motion to Value”) on June 10, 2014 asserting the Property has a value of \$87,000.00 as of the Petition Date. The Motion to Value was granted on July 23, 2014 (Doc. No. 23) then subsequently vacated upon consent of the Debtor because the Creditor was not properly noticed on the Motion to Value (Doc. No. 97).

The Debtor filed a Second Motion to Value the Creditor’s Claim (Doc. No. 98) on January 26, 2015 asserting the Property had a market value of \$87,000.00 as of the Petition Date. The Creditor responded asserting the Property’s value was in fact \$135,973.00 as determined by Zillow.com (Doc. No. 102). A hearing on the competing valuation motions was scheduled and then cancelled due to the parties reaching an agreement as to the Property’s value.

The Parties agreed to value the Creditor’s claim in the amount of \$87,000.00 with the balance of the claim being treated as a general unsecured claim (Doc. No. 114, the “the Agreed Order to Value”). The Agreed Order to Value was entered on April 15, 2015.

The Debtor now seeks to sell the Property and entered into a contract for sale on March 24, 2015 for a purchase price in the amount of \$128,500.00 (the “Sales Contract”). The Debtor proposes to pay off the secured portion of the Creditor’s claim calculated to be in the amount of \$80,861.77 and requests any remaining proceeds be released directly to the Debtor “as any

appreciation in the value of the property since the filing date would be property of the Debtor” (Doc. No. 112). The Debtor represented at the Hearing that she needs \$20,000.00 of the proceeds of the sale of the Property in order to refinance another property (the “Camden Property”) in which a balloon payment is due in month 24 of her confirmed plan in the amount of \$111,823.31.

The Trustee conditionally consented to the Motion to Sell provided any remaining proceeds from the sale be turned over to the Trustee for the benefit of unsecured creditors (Doc. No. 113, the “Conditional Consent to Sale”). The Trustee represented at the Hearing the Debtor had obtained an appraisal of the Property for \$5,000.00 less than the value provided in the Agreed Order to Value and that the Trustee would not object to the Debtor’s keeping \$5,000.00 from the proceeds of the sale of the Property so long as the remaining proceeds were turned over to the Trustee. No appraisal was attached to any motion to value the Property filed by the Debtor and all motions to value the Property provide the Debtor believes the fair market value for the Property to be \$87,000.00.

The Creditor objected to the Motion to Sell asserting the Debtor negotiated the value of the Property in bad faith as the Debtor engaged in the negotiations with the Creditor on the Agreed Order to Value knowing she would seek to sell the Property for an amount far greater than what she was negotiating with the Creditor as evidenced by the Sales Contract. The Creditor asserts this is an abuse of the bankruptcy process and requests the Court to take appropriate action pursuant to § 105(a) of the Bankruptcy Code. The Creditor argues the alleged bad faith conduct by the Debtor in negotiating the Agreed Order to Value constitutes grounds for

reconsideration of the Agreed Order to Value pursuant to Rule 60(b)(2) and (3) of the Federal Rules of Civil Procedure.

The Debtor filed her Motion to Modify Confirmed Plan (Doc. No. 122, the “Motion to Modify”) on May 15, 2015 after the Hearing on negative notice to reflect the Debtor’s proposed use of the sale proceeds. The Motion to Modify proposes to modify the Debtor’s confirmed plan to pay off the Creditor’s secured claim and the secured claim on the Camden Property. Payments to all other creditors would remain relatively unchanged under the proposed modification.

Valuation of the Property and Treatment of the Creditor’s Claim

11 U.S.C. § 506(a)(1) provides for the valuation of an allowed claim of a creditor secured by a lien on property of the bankruptcy estate. “Such value shall be determined in light of the purpose of the valuation and of the proposed disposition or use of such property.” 11 U.S.C. § 506(a)(1). Subparagraph (a)(1) of § 506 does not expressly provide the appropriate date for valuation and a split of authority exists on this point. *See In re In re Gilpin*, 479 B.R. 905, 908-09 (Bankr. M.D. Fla. 2011) (finding valuation must be made as of the date of the filing of the petition for the purpose of determining the extent of an allowed secured claim under § 506). *But see In re Roach*, 2010 WL 234959 (Bankr. W.D. Mo. 2010) (holding the value of a secured claim should be determined as of the effective date of the plan).

The Court adopts the former of these views. The appropriate date for purposes of valuing the Creditor’s claim is the date the petition is filed. The date a bankruptcy petition is filed is the vital date for numerous bankruptcy issues including imposition of the automatic stay and

determination of property of the estate. *See* 11 U.S.C. §§ 362(a) and 541(a). This date is equally crucial for purposes of valuation of collateral.

The Creditor does not explicitly dispute the value of the Property to be \$87,000.00 as of the Petition Date, but contends the Debtor's conduct in negotiating the Property's value affects the agreed upon value. The date of the Sales Contract does raise some concern, but the Petition Date is the critical date for valuation of secured claims and the Debtor's conduct does not change that. The Property is properly valued at \$87,000.00.

The Motion for Reconsideration

A motion for reconsideration may be construed as a motion for relief from a judgment under Bankruptcy Rule 9024, which incorporates Rule 60(b) of the Federal Rules of Civil Procedure. *United States v. Nutri-cology, Inc.*, 982 F.2d 394, 397 (9th Cir. 1992). Granting a Motion for Reconsideration is within the discretion of the Court. *See Robinson v. United States*, 259 F. App'x 170, 171 (11th Cir. 2007).

Rule 60(b)(2) and (3) permits a court to grant relief from a final order on a showing of:

- (2) newly discovered evidence that, with reasonable diligence, could not have been discovered in time to move for a new trial under Rule 59(b);
- (3) fraud (whether previously called intrinsic or extrinsic), misrepresentation, or misconduct by an opposing party.

Before granting a motion for reconsideration under Rule 60(b)(2) the Court must be satisfied that:

- (1) the proposed new evidence actually existed at the time of the trial;
- (2) the moving party could not have discovered the evidence earlier by due diligence;
- (3) the movant was diligent, and

(4) the evidence is not merely cumulative, that is, that consideration of the evidence would be likely to change the result.

Matter of Claxton, 30 B.R. 199, 214 (Bankr. E.D. Va. 1983) (citing Wright and Miller, *Federal Practice and Procedure*, § 2859 (1973)). The Creditor fails to meet the criteria that the new evidence of the Sales Contract would likely change the result of the value of the Property as the Sales Contract does not affect the value of the Property on the date the petition was filed. The Sales Contract merely reflects the value of the Property as of March 24, 2015—approximately two years after the filing of the petition. The housing market has steadily improved in recent history and an increase in the Property's value over two years is to be expected. An increase in value over time does not change the value of the Property at the time the petition was filed. Reconsideration is not warranted pursuant to Rule 60(b)(2).

A party seeking relief under Rule 60(b)(3) based on fraud, misrepresentation, or other misconduct “must establish (1) that the adverse party engaged in fraud or other misconduct, and (2) that this misconduct prevented the moving party from fully and fairly presenting his case.” *Wells Fargo Bank, N.A. v. Jones*, 391 B.R. 577, 588 (E.D. La. 2008). The Debtor did not misrepresent the value of the Property by withholding the Sales Contract because the Sales Contract does not represent the value of the Property for purposes of valuing the Creditor's secured claim. The timing of the Sales Contract is suspect, but it ultimately has no bearing on the value of the Property at the time the Debtor filed her chapter 13 petition. Reconsideration is not warranted under Rule 60(b)(3).

The Property's value was \$87,000.00 on the Petition Date. The Creditor's claim is bifurcated with a secured claim in the amount of \$87,000.00 and a general unsecured claim for the balance. The secured portion of the Creditor's claim must be paid in full over the life of the

plan. *See* 11 U.S.C. § 1325. The unsecured portion of the Creditor's claim will be paid in conformance with the confirmed plan's treatment of all other general unsecured creditors. If the Debtor completes all required payments and receives a discharge, then the lien related to this unsecured claim shall be declared void upon the entry of the discharge only. *In re Sadala*, 294 B.R. 180, 185 (Bankr. M.D. Fla. 2003).

The Motion to Sell the Property

11 U.S.C. § 363(b)(1) states that, "the trustee, after notice and a hearing, may use, sell or lease, other than in the ordinary course of business, property of the estate." 11 U.S.C. § 1303 gives the debtor this same power to use, sell or lease, "under sections 363(b), 363(d), 363(e), 363(f) and 363(l)." The Debtor's authority to sell the Property is not at issue, rather, the issue is who is entitled to any remaining proceeds from the sale of the Property after the Creditor's secured claim is paid in full.

This issue has been examined in the context of a chapter 13 trustee seeking to modify a chapter 13 plan where a debtor sought to retain excess proceeds from the sale of valued real property post-confirmation. These cases are informative because the Trustee's Conditional Consent to Sale contemplates modification of the Debtor's confirmed plan to disburse the remaining proceeds from the sale of the Property to unsecured creditors beyond what the confirmed plan currently provides for and the Debtor actively seeks modification of the confirmed plan in her pending Motion to Modify.

Courts considering this issue have focused on whether such proceeds are property of the estate and the proper standard for modifying a confirmed chapter 13 plan. The outcomes have varied. *See generally Barbosa v. Solomon*, 255 F. 3d. 31 (1st Cir. 2007) (holding excess

proceeds from the sale of valued real property sold post-confirmation would be property of the estate made available to unsecured creditors by modifying the debtor's plan); *In re Murphy*, 327 B.R. 760 (Bankr. E.D. Va. 2005) *aff'd*, 474 F.3d 143 (4th Cir. 2007) (holding refinancing of valued real property post-confirmation did not improve the debtors' financial condition and would not constitute cause for modification of the debtors' plan); *In re Stinson*, 302 B.R. 828 (Bankr. D. Md. 2003) (requiring a chapter 13 debtor to turn over excess proceeds from valued property post-confirmation upon a finding that the "best interest of the creditors" test must be met on the effective date of modification of the plan); *In re Euler*, 251 B.R. 740 (Bankr. M.D. Fla. 2000) (finding proceeds from the sale of property post-confirmation do not constitute disposable income and, therefore, are not property of the estate and requiring a showing of "substantial and unanticipated change of circumstances" in determining whether modification is warranted).

The Eleventh Circuit, under different facts, has adopted the view of the First Circuit with respect to post-confirmation property acquired by a chapter 13 debtor. *Waldron v. Brown (In re Waldron)*, 536 F.3d 1239, 1243 (11th Cir. 2008). The Eleventh Circuit explained:

The First Circuit also has concluded that assets acquired after confirmation are property of the estate. *Barbosa v. Soloman*, 235 F.3d 31, 36-37 (1st Cir.2000). After their Chapter 13 plan was confirmed, the debtors in *Barbosa* sold their investment property for a price greater than the value stated in their initial schedules of assets. *Id.* at 33. The trustee then moved to modify the plan to increase the debtors' payments to the unsecured creditors. *Id.* at 33-34. The First Circuit agreed with the argument of the trustee that, after confirmation, the estate "continues to be funded by the Debtors' regular income and post-petition assets as specified in section 1306(a)." *Id.* at 37. The court reasoned that this approach "harmonizes two apparent inconsistent sections," 1306(a) and 1327(b); allows for meaningful plan modification under section 1329; and is consistent with the ability-to-pay policy underlying Chapter 13. *Id.*

When a debtor acquires assets after confirmation the debtor's plan may be modified to increase payments made by the debtor to satisfy a larger percentage of the creditors' claims. *In re Waldron*, 536 F.3d at 1245. Modification of the debtor's plan must satisfy, among other requirements, the "best interests of the creditors test" pursuant to § 1325(a)(4) of the Bankruptcy Code applied as of the effective date of the proposed modification. *See* 11 U.S.C. § 1329(b)(1); *In re Nott*, 269 B.R. 250, 254 (Bankr. M.D. Fla. 2000).

The Debtor may sell the Property post-confirmation in excess of the claims secured by the Property, however, any surplus proceeds are property of the estate and any proposed modification of the Debtor's plan must satisfy, among others requirements, § 1325(a)(4) of the Bankruptcy Code. "Certainly Congress did not intend for debtors who experience substantially improved financial conditions after confirmation to avoid paying more to their creditors." *Arnold v. Weast*, 869 F. 2d 240, 242 (4th Cir. 1989). Creditors share both the gains and losses of the debtor. *In re Waldron*, 536 F.3d at 1246.

Accordingly it is,

ORDERED, ADJUDGED and DECREED that Nationstar Mortgage, LLC's Motion for Reconsideration of Order Granting Debtor's Second Verified Motion to Value Claim 9 (Doc. No. 120) is hereby **DENIED**; and it is further

ORDERED, ADJUDGED and DECREED that Nationstar Mortgage, LLC's Objection to the Motion to Sell (Doc. No. 119) is hereby **OVERRULED**; and it is further

ORDERED, ADJUDGED and DECREED that the Debtor's Motion to Sell (Other) Property (Doc. No. 112) is hereby **GRANTED**; and it is further

ORDERED, ADJUDGED and DECREED that the Debtor shall turn over any remaining proceeds from the sale of the Property in excess of the Creditor's secured claim to the Trustee.

The Clerk is directed to serve a copy of this Order on all interested parties.